IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2000 Session

STATE OF TENNESSEE v. PAMELA DENISE WISER

Consolidated Direct Appeals from the Circuit Courts for Bedford and Marshall Counties
Bedford No. 14415 Charles Lee, Judge
Marshall Nos. 13574, 13575, 13704, 13705, and 13706 Charles Lee, Judge

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No. M1999-02500-CCA-R3-CD - Filed October 30, 2000

Defendant Pamela Denise Wiser was convicted of twenty-two counts of the offense of criminal exposure to HIV, a Class C felony. Tenn. Code Ann. § 39-13-109 (1997). The offenses occurred in Bedford and Marshall counties. Defendant was sentenced to a total of twenty-six years and six months, with some sentences running concurrently and some consecutively. On this consolidated direct appeal, Defendant argues that the trial court erred in applying two enhancement factors and that the length of her aggregate sentence is not reasonably related to the severity of the offenses nor necessary to protect the public from further serious criminal conduct by Defendant. We find that the trial court erred in its application of one enhancement factor. We have determined, however, that the remaining enhancement factors are sufficient to support the trial court's sentence and that the aggregate sentence is not unreasonable. Accordingly, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

John E. Herbison, Nashville, Tennessee (on appeal) and Donna Leigh Hargrove, District Public Defender; and Andrew Jackson Dearing, III, Assistant Public Defender, Fayetteville, Tennessee (at trial) for the appellant, Pamela Denise Wiser.

Paul G. Summers, Attorney General and Reporter; Todd R. Kelley, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Defendant Pamela Denise Wiser was indicted by the Bedford County Grand Jury for fourteen counts of criminal exposure to HIV and by the Marshall County Grand Jury for nine counts of the same offense. Defendant pled guilty to all counts except for one from Marshall County which was dismissed. After a sentencing hearing, the trial court sentenced Defendant as a standard Range I offender to the following: three years-three months for the single count in indictment 13704; five years-three months for the single count in indictment 13705; six years for the single count in indictment 13706; terms ranging from three years-nine months to four years-six months for each of the eight counts in indictment 14415; terms ranging from five years-six months to six years for each of the six counts in indictment 13574; and terms ranging from five years-six months to six years for each of the five counts in indictment 13575.

Next, the trial court ordered that the sentences should be served as follows: sentence for indictment 13704 concurrent with the sentences for counts two and three in 14415; sentence for 13705 concurrent with the sentences for counts one through five in 13575 (all counts within 13575 to be served concurrent with each other); sentences for the six counts in 13574 concurrent with each other; and sentences for counts four through nine in 14415 concurrent with each other. The trial court also determined that Defendant was eligible for consecutive sentencing and ordered that the sentence for indictment 13704 should be served consecutive to counts two and three in 14415; the sentence for indictments 13757 and 13705 should be served consecutive to counts two through nine in 14415 and the single count in 13704; and the sentences for 13574 and 13706 should be served consecutive to all other sentences.

In sum, the trial court sentenced Defendant to twenty-six years and six months. Defendant raises the following issues on appeal: (1) whether the sentences imposed by the trial court are excessive within the applicable range, and (2) whether the aggregate length of consecutive sentences is reasonably related to the severity of the offenses and necessary in order to protect the public from further criminal conduct by Defendant. We find that the trial court erred when it applied the enhancement factor in Tenn. Code Ann. § 40-35-114(10) (1997). After a review of the record, however, we find that the remaining enhancement factors are sufficient to support the trial court's sentences. We affirm the judgment of the trial court.

I. FACTS

Judy Byrd testified that she interviewed Defendant in order to prepare the sentencing report. During the interview, Defendant stated to Byrd: "I told every guy I had sex with that I was HIV positive." Defendant also told Byrd that the men were drunk and that they all chose not to use protection. Byrd received contrary information from the victims, however. Joseph Hardy, for example, told Byrd that he was going to get a condom but Defendant told him that he did not need one. Another victim, Vernon Reid, claimed that he asked her "if there was any need to use a rubber" and that Defendant said "no." Victims Thomas Jamison and Barry Cozart informed Byrd that Defendant lived with them for a period of months, yet during that time no mention was made to

either victim that Defendant was HIV positive nor that they should be having protected sex. Victims Roger Holder, Chris Howell, and Jeff Witty claimed that they too had unprotected sex with Defendant. Byrd testified that Defendant said she learned of her HIV positive status in 1990 while she was pregnant with her first child. Defendant had a second child in 1996. Defendant has been married twice, once in 1990 and again in 1996. Her second husband died later that same year but the cause of death was not specified in the record.

Officer Betty Rhoton testified that her job includes investigating sexually related crimes and that she was the officer in charge of investigating Defendant's case. Her attention turned to Defendant when the mother of one of the victims, Barry Cozart, contacted Rhoton after her son was diagnosed HIV positive in April 1998. Defendant refused to admit to any sexual relationships other than with Cozart during Rhoton's first interview with her, but Rhoton believed that other victims existed based on Defendant's behavior. Defendant told Rhoton that she knew of her HIV status for only three years. Defendant also claimed that Cozart knew of her HIV status, but Cozart denied this when he talked to Rhoton. Rhoton encountered another victim, Joseph Hardy, accidentally while she was in court with Cozart concerning the charges against Defendant. Hardy was in court on a matter unrelated to Defendant at the time. Rhoton noticed that Hardy turned white when he heard the charge. He suddenly became very weak, and Rhoton said she had to help him from the courtroom.

Barry Cozart, age twenty-nine, testified that he met Defendant at a club and then took her to his home later that evening. Cozart had unprotected sexual relations with Defendant from January 1998 through March 1998, during which time Defendant lived in Cozart's house. At no time did Defendant mention to Cozart that she was HIV positive. Cozart said that he would not have had sexual relations with Defendant if he had known. He received news of Defendant's HIV status through his boss at work who in turn learned it from a friend of Defendant. He immediately asked Defendant to leave his home when he discovered she was HIV positive and did not have sexual relations with her again. Cozart is now HIV positive. He was initially sick for a month with "terrible sores in [his] mouth" and red rashes on his body. During the time he was sick, Defendant would go out with other men. Cozart claimed that he does not know why Defendant would hurt him.

Dr. McKnight testified that he is the physician for the Cozart family. He diagnosed Barry Cozart as HIV positive on April 9, 1998. Dr. McKnight informed the court that cases of AIDS/HIV are increasing in Tennessee and that Barry may die because he contracted the virus--the disease is ultimately fatal. But because many factors influence how fast the disease progresses, Dr. McKnight cannot predict exactly when Barry Cozart will die. Barry Cozart is a high risk patient because he also has cerebral palsy. Dr. McKnight further testified that the AIDS virus may be passed from mother to child. Consequently, he would not recommend that a woman who discovers that she is HIV positive have a child.

Roger Holder, age forty-nine, testified that he met Defendant when he gave her a place to stay at the request of his brother. Holder had been drinking the night he drove to meet Defendant but stated that he was not drunk. Holder also had unprotected sexual relations with Defendant and

claimed that she did not inform him that she was HIV positive nor that Holder needed protection. He testified that he would not have engaged in sexual relations with Defendant if he had known this. Holder and Defendant had more sexual relations the following evening. No drinking occurred, and Defendant still did not warn Holder of her HIV status. Afterward, Holder and Defendant went to a club. He left her sitting at the bar talking with some other men. A few months later Holder heard a rumor that Defendant was HIV positive and questioned her about it. Defendant denied being infected. Holder didn't see Defendant again until she appeared on television. His son said, "Daddy, that is the girl you went with." Holder testified that he "felt like dying" and that he was "about as scared as he had ever been in his life." He immediately went to the police station and the health department to be tested. Holder was HIV negative.

Jeff Witty, age thirty-two, testified that he met Defendant at a bar. After a few hours of talking and drinking, Witty and Defendant left together to go to his house. They were both intoxicated at this point. When they arrived at Witty's house, they engaged in unprotected sexual relations one time then Defendant left a few hours later. Defendant did not tell Witty that she had tested positive for HIV, and Witty does not remember whether or not he asked her. Witty learned of Defendant's HIV status when someone told him about it. Later he saw Defendant on the news. Witty testified that he felt "pretty rough" and scared when he knew that he may be HIV positive. He has been tested twice for HIV; both tests were negative.

Vernon Reid, age fifty-four, testified that he met Defendant at the Fox Camp tavern on Highway 99. Later that evening they left together to go to another club but subsequently changed their plans. Instead, they agreed Defendant should be taken by Reid to his house for a few drinks. Defendant told Reid that she had no place to go. Prior to having sexual relations, Reid claims that he asked Defendant twice whether there was any need to use protection and that Defendant answered "no" both times. Later, when Reid heard rumors regarding Defendant's possible HIV status, he questioned her again but she denied that she was HIV positive. After learning of Defendant's arrest, Reid took time off from work to be tested for the virus. He testified that for two weeks he could not sleep or think of anything else. Reid's tests were negative and he does not go to bars anymore.

Thomas Jamison, age thirty-eight, testified that he had never met Defendant before she telephoned him from the Shelbyville police station. Defendant told Jamison that a friend of his gave her his phone number; she asked if she could stay with him. Since Defendant claimed to have no place to go, Jamison picked her up and took her to his house. Jamison said that Defendant stayed with him from October 1997 through December 1997 until she met someone else. Prior to having sexual relations, Jamison asked Defendant specifically whether she had tested positive for HIV and Defendant said "no." Jamison stated that he would not have had sexual relations with Defendant if he had known that she was HIV positive. Jamison and Defendant engaged in unprotected sexual relations at least five times while they lived together. Jamison claimed that he was sober every time. Later, Jamison learned from a news report that Defendant was HIV positive. Jamison tested HIV negative, however. Jamison's victim impact statement states: "that was the most scared I have ever been." He further asserts that Defendant "caused pain, worry, and scare in my entire family. This person is a threat to everyone; has no respect for men, women and unborn children."

Wayne Thomas testified that he is a news reporter and interviewed Defendant at the Marshall County jail regarding the criminal charges against her. Defendant told Thomas that she had sexual relations with several men with knowledge that she was HIV positive. When asked why she did this, Thomas testified that Defendant claimed that she was infected by an old boyfriend and that now she wanted revenge.

Dana Kaye testified that she is a reporter with Channel 5 news who was sent to Lewisburg, Tennessee, to interview Defendant after she was arrested. Defendant told Kaye that an old boyfriend had given her AIDS and that she wanted to "get back at men for what he did to her." When asked whether she was referring to "revenge" Defendant answered, "yeah." At that time, Defendant estimated that she may have slept with as many as fifty men after knowing that she had AIDS. Upon further discussion Defendant said that she was "sorry," but when asked whether she felt she had "gotten even" she answered in the affirmative.

Pamela Wiser, the defendant, testified that she propositioned none of her victims but that they all came to her and asked her to go home with them. Wiser stated, "I am really sorry for what I done to them guys out there and I won't do it no more." In response to questions concerning her statements to reporters regarding her desire for revenge, Wiser said only that she did not know what she was thinking--she had a lot on her mind. Wiser claimed that she did not understand the consequences of her disease and promised to refuse sex with men from that day forward: "I promise you that I won't be back in no bar with no men if I get out of this. I am leaving the State of Tennessee. That is my word." Wiser testified that she has had sexual relations with eighteen men since she tested positive for HIV. She claimed that she informed all of them that she was HIV positive.

Dr. Adler testified as an expert in the field of psychology. He engaged in several discussions with Defendant while administering various psychological tests. When asked to give his opinion whether Defendant presents a high risk of going out and repeating the behavior which gave rise to the charges against her, Dr. Adler replied "the general psychological rule of thumb is that the best prediction of future behavior is past behavior." Regarding sexual behavior, Dr. Adler opined that people who have been engaged sexually in the past are likely to continue.

II. ANALYSIS

Defendant contends that the sentences imposed by the trial court are excessive within the applicable range and that the aggregate length of Defendant's consecutive sentences are not reasonably related to the severity of the offenses charged nor necessary to protect the public. We disagree.

When an accused challenges the length, range, or the manner of service of a sentence, this Court conducts a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing

principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this Court must consider the evidence received at trial and the sentencing hearing, the presentence report, the principles of sentencing and arguments as to sentencing alternatives, the statutory enhancing and mitigating factors, arguments of counsel, any statement that Defendant made on her own behalf, the nature and character of the criminal conduct involved, and the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, 103, 210 (1997 & Supp.1999); Ashby, 823 S.W.2d at 169; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). Defendant has the burden of demonstrating that the sentence is improper. Ashby, 823 S.W.2d at 169.

If our review reflects that the trial court followed the statutory sentencing procedures, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). To facilitate appellate review, the trial court "must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence." State v. Poole, 945 S.W. 2d 93, 96 (Tenn. 1997). Where the trial court fails to comply with the statutory provisions of sentencing, appellate review is de novo without a presumption of correctness. Id.

Here, the trial court erred in its application of enhancement factor § 40-35-114(10). Even though we find herein that an enhancement factor was improperly applied, the determinations of the trial court are still entitled to the presumption of correctness. Our supreme court, in State v. Gutierrez, 5 S.W.3d 641 (Tenn. 1999), indicated that the only time the presumption of correctness does not apply is where the record fails to demonstrate that the trial court considered the statutory sentencing principles. Id. at 644, n. 5. We therefore review the sentence de novo with a presumption of correctness.

A. Length of Sentences within Applicable Range

Defendant contends that the sentences imposed by the trial court are excessive within the applicable range because the trial court erroneously applied the enhancement factors in Tenn. Code Ann. §§ 40-35-114(7) and 40-35-114(10) (1997).

The trial court correctly found Defendant to be a standard Range I offender. Tenn. Code Ann. § 40-35-105 (1997). The range for a Range I offender convicted of a Class C felony is three to six years. Tenn. Code Ann. § 40-35-112(3) (1997). Defendant's individual sentences for each of the twenty-two counts charged are within the proper statutory range.

The record indicates that in determining the lengths of Defendant's sentences, the trial court applied the following enhancement factors: (1) Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, (2) the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great, (3) the offense involved a victim and was committed to gratify Defendant's desire for pleasure or excitement, and (4) Defendant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. §§ 40-35-114(1), (6), (7), (10) (1997). The trial court found that no mitigating factors applied.

Defendant does not challenge the application of enhancement factor (1) which concerns Defendant's prior history of criminal convictions or criminal behavior, and we conclude that it was properly applied. Tenn. Code Ann. § 40-35-114(1) (1997). Indeed, the record tells us that, in addition to the twenty-two counts of criminal exposure to HIV that Defendant pled guilty to, Defendant admitted to committing eleven unindicted offenses for the same criminal conduct against eleven additional victims. The trial court attached some weight to one misdemeanor conviction for failure to appear regarding a traffic offense. Defendant's prior criminal behavior was used to enhance all of the offenses before the trial court. We find no error in this application.

Defendant does not challenge the application of enhancement factor (6) which is used when personal injuries inflicted upon the victim were particularly great. Tenn. Code Ann. § 40-35-114(6) (1997). The trial court applied this factor only to the five counts concerning the victim Cozart who was later diagnosed HIV positive. We conclude that this factor was properly applied.

Defendant contends that the trial court erred when it applied enhancement factor (7) which requires proof that the offense involve a victim and was committed to gratify Defendant's desire for pleasure or excitement. Tenn. Code Ann. § 40-35-114(7) (1997). The trial court based its application of this factor on Defendant's statements to news reporters. Defendant told reporters that she committed the offenses to exact revenge against men in general for the man who first infected her with the AIDS virus. The trial court decided that in this case revenge was a form of excitement, and in the event revenge was not Defendant's motivation, the trial court was convinced that Defendant's acts were at least for pleasure. Factor (7) applies anytime an offender commits an applicable offense to gratify the offender's desire for any pleasure or any excitement. State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996) (e.g., a thief who steals for the pleasure of not getting caught, an arsonist who burns for the excitement that watching fire brings, etc.). Moreover, the motive need not be singular for the factor to apply. Id. (a single motive test is not present in the language or history of factor (7)).

After a de novo review of the record, we conclude that there is sufficient evidence to apply enhancement factor (7) to Defendant's case. We rely primarily on Defendant's statements to the reporters and Defendant's statements to the court during her sentencing hearing. Sentencing requires factual findings to be made by the trial court to resolve disputes relating to the evidence and to make credibility determinations. Since the trial court heard the testimonies and observed the witnesses,

it is in a superior position to an appellate court to make subjective findings regarding the existence of an enhancement factor. See State v. Winfield, ____ S.W.3d ____ (Tenn. 2000).

Defendant argues that our supreme court listed desire for revenge as one of the motivations which does not support application of factor (7) in State v. Adams, 864 S.W.2d 31,35 (Tenn. 1993). Defendant misinterprets the decision. The supreme court stated the following during its review of a rape case: "some acts of rape are not committed for pleasure at all...[but are] simply acts of brutality resulting from hatred or the desire to seek revenge, control, intimidate, or are just the product of a misguided desire to just abuse another human being." Id. The supreme court did not contrast pleasure with revenge per se, but instead compared it with acts of brutality which only possibly may be motivated by revenge, intimidation, or the need for control. The fact that a desire for revenge is present does not automatically preclude pleasure or excitement as contemporaneous with it. We interpret the supreme court's comment to mean that the desire for pleasure or excitement should not be inherently presumed nor summarily discounted from an act on its face. Facts relevant to sentencing must be established by a preponderance of the evidence, not beyond a reasonable doubt. State v. Carico, 968 S.W.2d 280, 287 (Tenn. 1998). We agree with the trial court that the State met its burden of proof.

Finally, Defendant contends that the trial court erred when it applied enhancement factor (10) which requires the proof to show that Defendant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10) (1997). We conclude that this factor is inapplicable to Defendant's case for two reasons. First, the record indicates that the trial court applied factor (10) with emphasis placed on Defendant's lack of hesitation to commit the offenses instead of on the high risk to human life. This was erroneous because "[t]he determinative language of this factor is 'the risk to human life was high.'" State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). As a practical matter, the presence or lack of hesitation is highly subjective and difficult to prove. Id. The more logical interpretation of factor (10) places the emphasis on the risk to human life. Id. Because the trial court placed emphasis on Defendant's hesitation rather than on the fact that the risk to human life was high, we conclude that this factor was not applicable to Defendant's sentences.

Secondly, we find that enhancement factor (10) is inherent in the offense itself. It is well-settled that enhancement factors are inapplicable when they constitute an essential element of the offense or are inherent in its commission. State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994); State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Belser, 945 S.W.2d 776, 792 (Tenn. Crim. App. 1996); State v. Kern, 909 S.W.2d 5, 7 (Tenn. Crim. App. 1995). Where proof necessary to establish that Defendant committed the crime would also establish that the "risk to human life was high," the enhancement factor is an essential element of the offense and therefore inapplicable. State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). At the heart of the criminal statute which prohibits a person from knowingly exposing another to HIV without consent lies the fact that this disease is ultimately fatal. It follows that high risk to human life is inherent in committing the crime. Therefore, enhancement factor (10) is inapplicable to enhance sentences for violating Tenn. Code Ann. § 39-13-109 (1997).

Neither Defendant nor the State argues that any mitigating factors applied, and we agree in our de novo review that none of the mitigating factors in Tenn. Code Ann. § 40-35-113 (1997) were applicable in this case.

In sum, we conclude that three enhancement factors and no mitigating factors apply. The record indicates that the trial court gave greater weight to enhancement factor (1), Defendant's prior criminal behavior, than the other factors. We find this evaluation proper. By contrast, factor (10) was not given substantial weight in the sentencing decision and so its erroneous application was of no consequence in light of the other enhancements factors, especially Defendant's long history of criminal conduct.

We further conclude that the trial court carefully weighed the time elements involved, the number of persons, and the gravity and number of offenses that the Court had been made aware of through the proof at the sentencing hearing. Moreover, we find that the sentences show a rational relationship between the offenses that occurred at the beginning of Defendant's criminal conduct and her behavior as time progressed. The trial court ordered the shortest sentence, three years-three months, for the first offense which was a single count indictment (13704) committed at the outset of Defendant's criminal activity. From there the trial court levied escalating penalties as time passed and the counts accumulated: sentences ranged from three years-nine months to four years-six months for the next seven counts (14415) which occurred a few months later; a sentence for five years-three months for the ninth count (13705) which occurred at the end of 1997; sentences ranged from five years-six months to six years for counts eleven through fifteen (13575) which began in January of 1998 (factor (6) applied because this victim is HIV positive); sentences ranged from five years-six months to six years for counts sixteen through twenty-one occurring later that year (13574); and lastly, a sentence of six years for the twenty-second count (13706). After a complete and comprehensive examination of the relevant facts and circumstances, we hold that the sentences for each conviction in this case are proper. Defendant is not entitled to relief on this issue.

B. Imposition of Consecutive Sentencing

The trial court sentenced Defendant to an aggregate sentence of twenty-six years and six months for twenty-two counts of criminal exposure to HIV. Defendant contends that because the trial court erred in its application of certain enhancement factors, excessive sentences within the range improperly skewed the aggregate sentence resulting from ordering consecutive sentences. Defendant argues that the cumulative length of more than twenty-six years is not reasonably related to the severity of the offenses and not necessary to protect the public from further criminal conduct by Defendant. We disagree.

We have already addressed the propriety of the sentences within the range for the twenty-two convictions of criminal exposure to HIV. Since the crux of Defendant's second argument against the length of her aggregate sentence rests on the fact that several of her sentences were ordered to be served consecutively, we rephrase this issue as one raising the question of whether consecutive sentences are proper in Defendant's case.

Consecutive sentencing is governed by Tenn. Code Ann. § 40-35-115 (1997). The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). The trial court found two criteria which justified consecutive sentencing: Defendant is a dangerous offender, Tenn. Code Ann. § 40-35-115(b)(4) (1997), and Defendant is an offender whose record of criminal activity is extensive, Id. § 115(b)(2).

In order to impose consecutive sentences as a dangerous offender, the proof must establish that the terms imposed are (1) reasonably related to the severity of the offenses committed, (2) necessary in order to protect the public from further criminal acts by the offender, and (3) congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). The trial court correctly found that Defendant was a dangerous offender based on proof that Defendant repeatedly exhibited reckless indifference regarding the contagious nature of her disease and she demonstrated a conscious lack of concern for the foreseeable circumstances, i.e., the "very real" potential for death that existed. The trial court was convinced by Dr. Adler's opinion and other testimony that Defendant would probably continue to engage in the type of criminal behavior that brought her before the court.

Even if it was error for the trial court to classify Defendant as a dangerous offender, her record of criminal activity is extensive and this fact alone justifies consecutive sentences. Tenn. Code Ann. § 40-35-115(b)(2) (1997). Defendant pled guilty to twenty-two offenses committed over a period of seven to eight months and admitted to committing twelve additional identical offenses.

The trial court ordered Defendant to serve some sentences concurrently and some consecutively. Indeed, Defendant faced a maximum of 112 years and three months in purely consecutive terms. Instead, the trial court gave Defendant the following concurrent sentences: sentence for offense 13704 concurrent with two counts in 14415; sentence for 13705 concurrent with all counts in 13575 (the sentences for the five counts in 13757 concurrent with each other); sentence for six counts in 13574 concurrent with each other; and the sentence for the remaining six counts in 14415 concurrent with each other. The trial court ordered five groups of sentences served consecutively which gives Defendant an aggregate sentence of twenty-six years and six months. This is less than twenty-four per cent of the consecutive sentence maximum.

Notwithstanding Defendant's concession in her brief that "there is a factual basis for some sentences to be ... served consecutively," she maintains that her aggregate sentence is "not rationally related to the gravity of the offense where all of the Defendant's sexual partners were willing participants and where only one victim is shown to have been infected by the HIV virus." This argument has no merit. We do not consider partners without knowledge to be "willing." Furthermore, the statute does not require the actual transmission of HIV in order for a person to have committed the offense. Tenn. Code Ann. § 39-13-109(e) (1997). For the above reasons, we find the trial court did not err when it ordered partial consecutive sentencing for Defendant and further, that the trial court placed in the record a principled justification for each sentence, including the consecutive sentences.

III. CONCLUSION

To summarize, in conducting our review of Defendant's sentences on twenty-two counts of criminal exposure to HIV, we find no error and affirm the trial court's judgments.

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THOMAS T. WOODALL, JUDGE